Clause 2 in exhibit P1, the end result in this judgment should be the same.

This is my view because the plan supplied by the Forest Department clearly referred to the area to be worked as being 2,060 acres and that the quality of that land was virgin jungle. The same plan supplied by the plaintiffs refers to the same area with this slight difference that it is described as an area which has not yet been worked. In each case there were 2 representations. One as to the size of the area and secondly as to the quality of the material available thereon.

With respect to PW1, to say that the agreement dated June 17, 1974 was a lump sum contract and therefore the defendants were liable willy nilly to pay the tender price of $77,000/- (excluding Forest premium) based on a working area of 2,060 acres does not seem to me to be right.

On June 17, 1974, notwithstanding the execution of the agreement between the parties, there were terms which had still to be finalised. The non-completion of clause 1 of the agreement is indicative of this as is the issue of the licence only on June 19, 1974 followed by the further negotiations between the parties for the reduction of the premiun from $72,000/- to $27,160/-. Furthermore the working area of the compartment was reduced from 2,060 acres to 776 acres by the Director of Forest Department (see his letter dated September 8, 1974 – see PBD 11).

In these circumstances it is my finding that the plaintiffs should have in equity and good conscience followed the line taken by the Forest Department and reduced the amount payable to them *pro rata* because this is all they were in justice entitled to.

In short if the agreement is to be viewed as a lump sum contract it was not a lump sum contract for 2,060 acres but for 776 acres. The contract could in no sense be said to have become finalised until the area to be worked was known and the liability of the defendants for the premium payable to the Forest Department had been computed. Only then could the consideration for the contract be accurately determined. In conclusion I would agree with defence counsel that the proper sum due and payable to the plaintiffs is only $1,005/- and there will be judgment for the plaintiffs for this amount.

The interest if any upon this sum and the date from which it is to commence and also the measure of the costs which are to be awarded to the plaintiffs are matters on which the Court invite further argument from the parties.

Having heard further argument, I adjudge that the plaintiffs be entitled to their costs on the Magistrate's Court's Scale and only up to the date of the payment into Court by the defendants on April 11, 1979. The defendants shall have all their costs of the High Court Scale as from April 12, 1979. There will be no interest on the decretal amount and the sum of $1,005/- paid into Court shall be paid out forthwith to the plaintiffs' solicitors in full satisfaction of the judgment herein.

Order accordingly.

Solicitors: *Hassan Yunos & Co.; H.H. Long & Co.*

CHUNG KHIAW BANK LTD. v. SOI HUAN & ORS.

[O.C.J. (Shankar J.) March 7, 1985]

[Johore Bahru – Civil Suit No. 442 of 1984]

Contract – Guarantee – Joint and several guarantee to the bank given by directors of company – New directors appointed – Additional guarantee taken from new directors – Old directors not discharged – Guarantor's liability is secondary but can become primary by agreement – Guarantors can be sued even before a judgment had been obtained against the principal debtor – Variation of contract – Surety not discharged if agreement authorises the creditor to vary the terms – Extension of time to principal debtor – Surety is not discharged if the contract of guarantee empowers the creditor to extend the time – Contract Act, 1950, ss. 81, 86 & 88.

In this case the defendant and three others were directors of Tuahbina Sdn. Bhd. The company had taken a loan from the defendant bank which was guaranteed jointly and severally by the four directors. The directors subsequently sold their shares to the knowledge of the bank and new directors of the company were appointed in their place. Additional guarantees were taken from the new directors for the company's indebtedness. In February, 1983 the indebtedness of the company to the bank amounted to $3,151,554. The bank sent a notice of demand to the company and the guarantors. On July 31, 1984, the bank initiated action against the defendants for recovery of the money under the letter of guarantees. On September 8, 1984, the court made an order for winding up of the company.

The bank applied for summary judgment against the defendants on the ground that there was no defence to their action. The matter came before the Senior Assistant Registrar and he found that the defendants had shown no defence and ordered summary judgment to be entered against them. The defendants appealed against this order. They raised the following pleas:

(1) that the liability of a guarantor is secondary and does not arise until the liability of the principal debtor has been legally established;

(2) that directors who had signed the guarantee were only to be liable thereon as long as they held office in the company as directors;

(3) that when the bank took a fresh guarantee from the new directors it necessarily followed that the defendants as old directors were absolved of their liabilities;

(4) the bank unilaterally varied the terms upon which the company was to repay its loan; and

(5) the bank was guilty of laches.

Held: (1) the guarantee was so worded as to make the liability of the guarantors primary and coextensive with the company;

(2) the directors had signed the guarantee in their personal capacity and they were liable on it even if they had ceased to be directors;

(3) a fresh guarantee was taken from new directors in addition to the existing guarantee;

(4) the agreement of guarantee was widely worded and permitted the bank to vary the terms of guarantee;

(5) the terms of the guarantee empowered the bank to extend time to the company;

(6) the decision of the Senior Assistant Registrar that summary judgment be entered against the defendants for $2,235,000 with interest thereon at the rate provided by the guarantee was affirmed.

Cases referred to:

(1) *Coutts & Co.* v. *Browne-Lecky & Ors.* [1947] K.B. 104.
(2) *Duncan Fox & Co.* v. *North and South Wales Bank* (1880) 6 App. Cas. 1, H.L.
(3) *Ewart* v. *Latta* (1865) 4 Macq. 983, 987, H.L.
(4) *Hansard* v. *Lethbridge* (1892) 8 T.L.R. 346.

CIVIL SUIT.

Chelliah Paramjothy for the appellants.
L.M. Ong for the respondents.

Cur. Adv. Vult.

Shankar J. : This is an appeal against the decision of the Senior Assistant Registrar granting leave to the plaintiffs to sign final judgment under Order 14.

The salient facts are as follows. Tuahbina Sdn. Bhd. (hereafter referred to as the Company) has been lent monies by the plaintiff bank (hereafter referred to as the Bank). The loan was secured by various charges executed by the Company in favour of the Bank and by a debenture. One of the conditions for the granting of loan facility to the Company by the Bank was that all the Directors of the Company were to sign a joint and several guarantee.

On July 7, 1980, the Bank's letter of guarantee was signed by all the three defendants and one Abdul Malik @ Hussein bin Abdullah. The guarantee was on the Bank's standard printed form and, if I may say so, with respect, had been so drafted as to plug every conceivable loop-hole in the law relating to such matters, which could be taken advantage of by would-be sureties. This letter of guarantee was conditioned to stand good for the recovery of a principal debt not exceeding $2,527,500.00 excluding any interest accruing due on the principal amount lent. In the Bank's letter November 28, 1979, in addition to the four persons already named, there was one other person named who was also to sign the letter of guarantee. This person was one Lai Ah Pin. But before the letter of guarantee was executed, the Secretary of the Company is said to have certified that only the four persons who actually signed the letter of guarantee were directors and the Bank accordingly did not insist that Lai Ah Pin should also sign the guarantee.

In May 1982 the defendants entered into an agreement to sell off all their shares in the Company to some third parties and by June 1982 the Agreement was implemented. All the defendants resigned their directorships upon the transfer of their shareholdings to the third parties. The Bank was aware of this transaction and on December 31, 1982 the Bank obtained a further guarantee from the new directors of the Company to cover the existing indebtedness of the Company to the Bank. On February 26, 1983 the indebtedness of the Company to the Bank amounted to $3,151,554.22. That day a letter of demand was sent by the Bank to the Company.

The Company's response to this was to send a letter to the Bank on March 13, 1983 admitting the debt but requesting two months to make arrangements to satisfy their obligations. But in the event this did not happen. Instead on May 17, 1983 the Company initiated a Civil Suit No. 136 of 1983 against the Bank and Chung Khiaw Finance Ltd. who had also advanced money to the Company on the strength of a second debenture. In this action the Company claimed that the Bank had been guilty of various infractions of their obligations under the relevant documents.

In effect the writ is a claim for damages which the Company is alleged to have sustained from the acts of the Bank in insisting upon repayments in a manner which the Company was unable to fall in line with. There are also complaints that the Bank did not accept other proposals for repayment which had they been accepted would have substantially reduced the indebtedness of the Company.

After issuing notices of demand to the Guarantors on March 9, 1984 the Bank did not obtain satisfaction and on July 31, 1984 the Bank initiated this action against the defendants for recovery of the monies due to them under the letter of guarantee referred to earlier. On September 8, 1984 this Court had made an Order that the Company be wound up.

The defendants after being served with the proceedings entered appearance in this action in October 1984 and on October 31, 1984 the Bank applied for Summary Judgment on the ground that there was no defence to their action. The application was supported by the affidavit of the Bank's Manager which exhibited the letter of guarantee signed by the defendants on July 7, 1980 (hereafter referred to as the said guarantee).

In November 1984 the first defendant on his own behalf and on behalf of the other two defendants filed an affidavit to show cause why the defendants should be given leave to defend this action. At the same time a defence was filed setting out the grounds on which this claim was sought to be resisted. Every point taken by the defendants was covered by an affidavit in reply by the Bank Manager affirmed on December 26, 1984. Suffice it to say at this juncture that in effect the Bank's stand was that the guarantee had been drafted so widely that it would successfully prevent the defendants from being discharged from liability by the omissions of which they complained.

The matter came up before the Senior Assistant Registrar on January 21, 1985 and he found that the defendants had shown no defence whatsoever either on the facts or on the law and therefore ordered Judgment to be entered against the defendants.

To support the defendants' appeal various propositions of law have been cited setting out the circumstances in which a surety stands in a somewhat more favourable position than the principal debtor and could actually be absolved of liability if there had been any departure from the basis upon which the surety had assumed his obligations. With these legal propositions, no one can quarrel. But, with respect to counsel for the appellant, it is very hard to see how anyone with an open mind could entertain any reasonable belief that these legal propositions had any application to the facts before us.

The first line of defence is that the liability of a guarantor is secondary and does not arise until the liability of the principal debtor has been legally established. Then it is submitted that until the Company's Suit in the Muar High Court is finally determined the Bank cannot proceed further against the defendants. But Clause 15 of the Guarantee provides:

> "Though as between us and the Customer we are sureties only for the Customer, yet as between us and you we and each of us shall be deemed to be principal debtors for all the moneys the payments of which is hereby guaranteed and accordingly shall not be discharged nor shall our liability be affected by any fact or circumstances or any act thing omission or means whatsoever, whereby our liability would not have been discharged if we had been the principal debtors."

Those interested in the history of this kind of wording and the loophole that it was intended to plug, may refer to the commentary on *Coutts & Co.* v. *Browne-Lecky & Ors.*[1] in *J. Milnes Holden's* Law and Practice of Banking Vol. II page 234 paras. 19-44 to 1947 – Securities for Bankers' Advances. In a nutshell the result of this wording was to make any legal incapacity of the borrower irrelevant because by virtue of the clause just quoted the persons executing it can be treated as primarily liable and sued accordingly. It therefore appears to me that the claim for damages by the Company against the Bank in the Muar High Court Civil Suit is no answer to the Bank's claim against the guarantors in this action.

Mr. Paramjothy was unable to produce any authority to support his proposition that until a judgment had been obtained against the principal debtor it was not open to the Bank to sue the guarantors. In fact legal authority goes the other way and in this connection reference may be made to the cases of *Duncan Fox & Co.* v. *North and South Wales Bank*[2] and the Scottish case of *Ewart* v. *Latta*[3] both of which are commented upon in *Paget's* Law of Banking 8th Edition at page 515 and 516.

The next line of defence is that in law the surety is entitled to insist upon a rigid adherence to the terms of his obligation by the creditor and cannot

be made liable for more than he had undertaken. Based on this, an argument has been mounted that the proper interpretation of the Bank's letter dated November 29, 1979 which required that all directors of the Company should furnish a joint and several guarantee for the repayment of the loan was that the directors who had signed the guarantee were only to be liable thereon as long as they held office in the Company as directors. In other words, it was submitted that the moment the defendants resigned their directorships on June 28, 1982, they automatically ceased to be liable on the guarantees they had executed. The argument is so bizarre, that it is not worth a moment's consideration.

The next defence advanced is based on the case of *Hansard* v. *Lethbridge*[4] where it was decided that a surety who had entered into an undertaking in the belief, which he gathered from the form of the undertaking, that others named therein would also execute the document, was not bound in the absence of the signatures of the others. Reference was also made to *Paget's* Law of Banking 7th Edition page 580. Mr. L.M. Ong has submitted to me that the Company's Secretary had certified when the guarantee was executed that it was the four named persons who were the Company's Directors and that it was appropriate for the Bank to infer that Lai Ah Pin was not. Be that as it may, it must have been manifestly obvious to the defendants when they signed the guarantee that Lai Ah Pin's name had been totally omitted from page 4 of the document where the names of the signatories appear and it is preposterous that the defendants should be allowed to come now and take such a point.

As a logical extension to this argument the defendants also sought to contend that when the Bank took a fresh guarantee from the new directors it necessarily followed that the defendants as old directors were absolved of their liabilities especially as the Bank was aware that the defendants had sold off their shares and resigned their directorships. But then Clause 21 of the guarantee and the fresh guarantee were both in identical terms and read as follows:-

"This guarantee shall be in addition to and not in substitution for any other guarantee or other security for the customer which you may now or hereafter hold whether from us or any one or more of us or otherwise and on discharge by payment or otherwise shall remain your property."

Consequently that argument is also devoid of merit.

The next line of defence is that the Bank unilaterally varied the terms upon which the Company was to repay its borrowings and that this variation automatically discharged the sureties. Reference is made to Volume 18 of *Halsbury's* Law of England 3rd Edition pages 502-507. But Clauses 8, 9 and 10 of the guarantee in so many words permitted the Bank to resort to other means of payment at any time and in any order that the Bank thought fit or to vary or modify the securities held by the Bank, and to give time to the Company and to vary credit given to the Company, without in any way prejudicing the rights of the Bank against the guarantors.

The last line of defence taken was laches and reference was made to Volume 14 *Halsbury's* Laws of England 3rd Edition at page 641. But Clause 9(c) of the guarantee empowered the Bank to extend time to the Company.

In this case neither the Company nor the guarantors in this action ever disputed that the monies claimed by the Bank was in fact owing to them. In the circumstances the Bank, by virtue of the documents which it held, had all of the remedies which those documents gave them, and in the absence of any indication to the contrary, they were left unfettered and at liberty to exhaust those remedies and in my view it is not open in the mouths of either the Company or the guarantors to attempt to put any limitation upon the terms of the debt being completely satisfied.

The principal lent which this guarantee covers was $2,325,000.00 and I affirm the decision of the Senior Assistant Registrar that Summary Judgment be entered against the defendants for that amount and for interest thereon at the rate provided by the guarantee. Admittedly the amount for which the Bank was suing was very large, but there are other considerations here which make it desirable in my view to state that while legal submissions unworthy of argument may have the merit of buying time for hard-pressed litigants, their ultimate effect would not only be to erode the credibility of their proponents but also of the Courts, whose business it is to ensure that justice is not delayed.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors : *Wong & Paramjothy; L.M. Ong & Co.*